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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 561

ORAN H. RUPERT, PETITIONER,

VS.

THE EMPIRE DISTRICT ELECTRIC COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner, Oran H. Rupert, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case of *The Empire District Electric Company* v. *Oran H. Rupert*, Civil No. 14571, entered November 18, 1952.

Statement under Rules 27(d) and 38(2).

(a)

The suit is one to recover damages for a maritime tort suffered by Captain Rupert, Infantry, U. S. Army, when he was swept and sucked over a dam maintained and operated by respondent across navigable waters of the United States. Petitioner brought a common-law action to recover damages *in personam* in the United States District Court founding jurisdiction of that court on diversity of citizenship. He alleged that respondent had negligently failed to post or maintain any warning signs, booms or buoys in front of the spillway section of its dam, erected by authority of Congress, and that as a result petitioner, a complete stranger to the situation, while navigating the waters in a small fishing boat was sucked over the spillway into the whirlpool below.

The dam in question is located on the White River in Taney County, Missouri. The White River is a navigable stream of the United States (see Stipulation, Tr. 10, and Majority Opinion, 199 F. 2d 941, l. c. 942).

The entire structure, including the hydroelectric plant near the right bank, is approximately 1300 feet long. The spillway section is 593 feet long and is located near the center of the dam, being what is known as an open or uncontrolled spillway. The spillway section and power house section are of mass concrete construction. The left end of the spillway joins an earth embankment 420 feet in length connecting to the left bank of the stream. The power plant section on the right bank is 228 feet long. The dam rises 50 feet from the bed of the stream. Flashboards 26 inches high are maintained along the top of the spillway section creating a knife-like edge over which the water passes when the spillway is overflowing to the whirlpool some 50 feet below.

Respondent's predecessor (The Ozark Power & Water Company), its successors and assigns, were authorized to construct, maintain and operate this dam across the White River "at a point suitable to the interests of navigation" approximately 10 miles downstream from the towns of Hollister and Branson, and four miles upstream from the town of Forsyth, Taney County, Missouri, in accordance with the provisions of an Act of Congress of June 23, 1910. (See Public Law No. 342, approved February 4, 1911, 36 Stat. at Large, p. 897. The Act of June 23, 1910, is found in 36 Stat. at Large, p. 593; also reprinted in Editorial Comment, Title 33, U. S. C. A., p. 375).

Respondent admittedly does not maintain any warning signs of any kind or character in front of the dam to warn those navigating the stream either as to the location of the spillway or the perimeter of the danger zone where one may lose control of a boat and be drawn and sucked over the dam by the current created by the overflowing of the spillway. Neither does respondent maintain any booms or buoys in front of the spillway section or anywhere in front of the dam either to protect or to warn navigators.

The case was submitted to a jury (jury trial being demanded) under instructions on the merits not complained of by respondent on appeal. The jury, after deliberation, resolved the issues of fact submitted to it in favor of petitioner and returned a verdict for $25,000.00.

On appeal by respondent two judges of the Court of Appeals (Thomas, J. and Riddick, J.) have declared as a matter of law that petitioner is not entitled to recover and have reversed the judgment outright. To reach this result they have disregarded the conclusion of the jury, declared petitioner guilty of contributory negligence and have, in this maritime case, declared such contributory negligence a defense to the action and held that the trial

court for that reason erred in not granting respondent's motion for an instructed verdict.

Judge Johnson, in his dissenting opinion (addressing himself to the sole question of whether petitioner could be judicially declared guilty of contributory negligence), has pointed out that the point of actual danger to boatmen approaching the dam when the spillway is overflowing was a variable one under the evidence, both as a matter of fact and of apparency; that the observational point of danger under the existing conditions was a question for the jury and not for the court; that it cannot be judicially declared how close to the dam a boatman was warranted in going at any particular time, especially in view of the failure of respondent to establish by warning signs, booms or buoys a general danger zone; that without the establishment and posting of such a general danger zone by respondent as a legal constant, and in view of all the variable conditions revealed by the evidence, both of fact and of observation, it cannot be judicially declared at what point petitioner could see and observe that he was subjecting himself to danger.

(b)

Essential facts revealed by the evidence are these:

Petitioner, having returned from foreign service, was granted leave of absence and went with his wife to Lake Taneycomo for a vacation. Neither had seen the lake before and only knew it was a recreational area.

June 12, 1950, was a bright, sunny day. There was, according to respondent's gauges and instruments located in its dam (but of which petitioner had no knowledge nor of their readings), approximately 2 feet of water going over the top of the flashboards which was a normal overflow—not a flood condition (Tr. 53).

About noon of that day, petitioner rented a small 14-foot fishing boat on which he mounted his own 1½ H. P. Evinrude outboard motor, and started downstream. His purpose was to view the scenery and take pictures. He was alone in the boat. The first indication that he was approaching the dam was his observation of the low concrete structures on either side of the lake. The majority opinion summarizes the evidence at this point as follows (199 F. 2d 941, l. c. 943):

> "No one had ever described the dam to him. He had no information that a 600-foot open spillway was across its center. He had never seen a dam with an open spillway through the center 600 feet and did not know that such type dam was constructed. He saw no warning signs of any kind, no boom across the lake in front of the structures, no floating buoys. No one had given him any warning, and he proceeded downstream with his motor half open, as was customary. There was no turbulence or current in the water. It was more turbulent upstream than immediately above the dam. He did not observe any current nor see any driftwood, twigs or leaves moving down the lake."

As he approached the low concrete structures he reduced his speed and when he got closer made a short arc and reversed himself and went back upstream a couple hundred yards near the right bank where he let the motor idle, took his camera from the case and adjusted a filter to take a cloud picture. From that moment until days later in a hospital his mind is blank. He testified:

> "I intended to retrace my first course and take the picture, and that is the last thing I remember."

He remembered nothing about going over the dam or the fall into the whirlpool below.

At the trial he estimated that on his first approach to the dam before he made the arc to turn he was 25 or 50

feet from what evidently was some point in front of the spillway section but did not know it was the spillway section (Tr. 14 and 19). He had nothing to base his estimate of distance on, "the actual footage I couldn't pin down to save my neck" (Supp. Tr. 7). How far he proceeded, if at all, in attempting to retrace his first course before his boat went out of control and over the brink is not disclosed by the evidence because of his memory blackout.

As to what he saw and observed as he approached the dam the first time, he states (Tr. 16, 17, 18):

> "I was making general observations and was looking all around, as that was the whole purpose, but I saw no indication of water passing over the dam. I did hear the roar of water, but had the impression that the spillway was over at the right-hand side where the larger buildings were located. This was based on past experience, as invariably there is a spillway and it is usually to one side or the other and the size of the structure gave me that impression. * * * Between the two structures it had the appearance of a fish pond—it was black and was just as though you were in a pond that was closed. It was placid in appearance and there was a dark line of demarcation across the entire 600 feet. There was no splash or spray and the water appeared perfectly smooth and I could not see or appreciate that water was flowing over the crest. This was in the pond and I couldn't see over the so-called crest and was not aware that it was a crest. * * * As I turned back upstream I assume that I increased the throttle slightly going upstream but did not appreciate any feeling of current or tow, and it was not appreciably different going up than it had been coming down."

Petitioner further testified that he "had no feeling of danger" but "had I known that was a spillway I would have been aware of the danger and known it" (Tr. 18, 19).

Petitioner is corroborated that from his position in a small fishing boat (he is of short stature—5½ feet and his eye level was about 3 feet above the water level (Tr. 17)) he *could not see* that water was flowing over the spillway section. Leroy Smith, respondent's Plant Superintendent, testified (Supp. Tr. 16) that the water is "perfectly smooth until it spills over and down, and until it breaks it is perfectly smooth." Lawrence Bartlett, General Superintendent of respondent, testified that the falling water cannot be seen until "you get right up to the flashboards and *direct your vision down*" (Supp. Tr. 14).

No witness testified to having seen the accident. Respondent contented itself with showing by depositions that there are a number of dams located in various parts of the United States of the open or uncontrolled spillway type where no warning signs, booms or buoys are maintained. On this point petitioner showed by a civil engineer of the Corps of Engineers of the War Department stationed at North Little Rock, Arkansas (employed by the Corps for approximately 26 years and familiar with operational procedure at various types of dams, particularly safety measures affecting the public), that the Corps of Engineers deem it necessary to maintain and do maintain warning signs, booms or buoys, or all three depending upon circumstances, in front of dams operated by the Corps (Tr. 26-30). He testified (Tr. 29, 30):

> "I regard the maintenance of the signs as necessary to the proper and careful operation of the dam to safeguard the public in its use of the area, particularly the water, as it is essential that the public keep away from a structure that is a hazard or that offers danger. I do not consider the concrete structure as a warning to the public * * *. It has been my observation that the public does not understand the danger involved by water passing through machinery

that operates the power plant or through the spillway or taintor gates, even where signs are not maintained. * * * To my knowledge, there is no regulation of the Corps of Engineers or War Department requiring the maintenance of either booms or warning signs above dams and they are maintained because I and the officers in charge deem it necessary in our judgment."

Opinions Below.

The District Court rendered no opinion. Its views are reflected in its charge to the jury (Tr. 82-83). The opinion of the Court of Appeals appears at pages ..... of the transcript of the record and is officially reported, 199 F. 2d 941.

Jurisdiction.

The judgment of the Court of Appeals was entered November 18, 1952, and rehearing denied December 10, 1952. The jurisdiction of this court is indicated under 62 Stat. 928, 28 U. S. C. A. 1254.

Questions Presented.

1. Is the owner and operator of an authorized dam across navigable waters of the United States under any duty to protect those exercising the paramount right of navigation from injury by maintaining appropriate warning signs, booms or buoys in front of spillways and power intakes?

2. Is the effect of contributory negligence, where the injury occurs while the right of navigation is being exercised on navigable waters of the United States and the alleged cause of injury is failure to warn and protect against dangers created by the operation and maintenance of an obstruction authorized by Act of Congress, governed by common-law or admiralty law when the suitor is pursuing his common-law remedy?

3. Is the Court of Appeals, regardless of whether admiralty or common law principles apply, permitted to reweigh the evidence and substitute its own conclusion for that of the jury on the question of existence or non-existence of contributory negligence?

Reasons for Allowance of the Writ.

I.

There is no decision of this court and no decision of any Federal court respecting the duty of the owner and operator of an authorized dam on navigable waters of the United States to appropriately warn and protect those exercising the paramount right of navigation of the dangers and hazards involved in approaching such a structure and particularly the spillway and power intake portions of such structure. It is important to the public interest that this question of federal law, which has not been, should be settled by this court.

In legal effect the majority has held that there is no duty to warn and protect boatmen against dangers created by the operation of the dam and has placed the responsibility of recognizing, apprehending and avoiding danger on the boatmen. In legal effect the majority has held that members of the public must find out for themselves not only that danger exists in front of this dam but at what point and in what area the danger exists. Specifically, the majority has held that Captain Rupert not only could but should have seen and appreciated where the spillway section was located and that 2 feet of water was overflowing its entire 600-foot length and that respondent owed him no duty of warning or protection, even though he was wholly without knowledge and without any background of experience that would even make him suspicious.

Petitioner contends that one in his situation, without previous knowledge of the particular dam and without knowing that such types of dams exist, cannot in the absence of appropriate warning and protective measures by respondent be legally charged with the duty of avoiding the danger and ascertaining the location and boundaries of the danger zone, especially where there is no turbulence, no detectible current, no back spray of falling water to be seen, no driftwood, twigs, leaves or debris moving down the lake and when he did not in fact see and observe the spillway and that it was overflowing.

The existence of grave danger is admitted by both the Plant Superintendent and General Superintendent of respondent (Tr. 50-54). They ascribe failure of respondent to post suitable warnings or to maintain booms and buoys to the fact that they felt that the danger "was self-evident to any one who might be on the water" (Tr. 51) and to the fact that "in the daytime you can see the concrete structure and would know there was a dam" (Tr. 54). But the danger was not in the naked existence of the concrete structure which petitioner saw. He did not drive his boat into the visible concrete structure. The danger was in the location and character of the spillway plus the fact that it was hidden by 2 feet of water overflowing the knife-like edge of the flashboards, which overflow petitioner was not able to detect from his position and which he did not suspect since he did not know that there was such a type of dam constructed anywhere.

Petitioner contends that Congress never intended nor authorized the owner and operator of such a dam to ignore, without legal liability, dangers to the navigating public, well known to the owner and operator but hidden, not apparent, not observable and not appreciated by those unfamiliar with dams or the particular type of dam involved.

Petitioner contends that the provision of the Act of J
23, 1910 (36 Stat. 593), which provides in part that
owner and operator of such dam "shall maintain at t
own expense, such lights and other signals thereon
such fishways as the Secretary of Commerce and La
shall prescribe, and for failure so to do in any resp
shall be deemed guilty of misdemeanor," does not meas
the full duty of respondent but is only a requirement t
respondent will comply with directives issued by th
officials.

It has, we think, been recognized in the few ca
that have touched the point, that authority to create
obstruction plus adherence to the letter of the lice
is not the measure of legal responsibility to third perso

Thus, in *Red Star Towing & Transportation Co.*
Snare & Triest Co., 194 Fed. 672 (C. C. A. 2), it was s
that "it does not follow from the fact that the respond
was authorized to place the piles where it did that it ow
no obligation with respect to them." In *Consolidated C*
Co. v. *Knickerbocker Steam Towage Co.*, 200 Fed. 840
C., Me.), it was pointed out that defendant's duty to th
persons was not measured by the provisions of its c
tract with the United States (to remove a ledge bene
navigable waters) but "such duties to third persons
independent of their contractual relations."

In *Williams* v. *Edward Gillen Dock, Dredge & C*
struction Co., 258 Fed. 591 (C. C. A. 6), the contract
tween the United States and defendant to build a bre
water required defendant to "maintain at its own expe
lights and signals required by the engineer or by the re
lations of the United States Lighthouse Board." No regu
tions were introduced in evidence and the record did
disclose what specific requirements, if any, the engin

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in charge had made with respect to lights. Nevertheless the court concluded that a legal duty is "* * * imposed upon any one constructing an obstacle in water thus used to exercise reasonable care for the safety of all persons making use of the harbor, and this duty obviously required the placing and maintaining of a suitable warning light."

In *Harrison* v. *Hughes,* 110 Fed. 545 (D. C., Del.), the court said:

> "But this court is not prepared to hold that the measure of their contractual obligation to the Government necessarily limited or defined the precise measure of their duty to third persons, whose lives and property would be exposed to extreme peril, in case of failure to indicate at night the northwesterly end of the breakwater by the maintenance of the stakelight, or some other light at that point, or by other means. They owed a duty to such third persons independently of their contractual obligations. * * * In omitting to resort to such or other precautions they failed to exercise the degree of care which the law demanded of them and were guilty of fault proximately causing or contributing to the accident."

II.

The Court of Appeals has applied Missouri decisions on the effect of contributory negligence. Petitioner contends that since his injury occurred on navigable waters of the United States while he was engaged in the exercise of the right of navigation his substantive rights are governed by the principles of admiralty law and the Rules of Decision Act (Title 28, U. S. C. A., Section 1651) is wholly inapplicable.

Under Title 28, U. S. C. A., Section 1333, the District Courts of the United States are granted exclusive original jurisdiction of any civil action of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled." This provision

first appeared in the Judiciary Act of 1789 (by the First Congress) and saved to all suitors in all cases "the right of a common-law remedy, where the common law is competent to give it."

The common law has always offered a remedy *in personam* in the case of maritime torts. Section 1333 of the Code means, and has been construed to mean, that in the case of maritime torts the injured person may pursue his common-law remedy if adequate for the relief sought. Under such circumstances the suitor has an election whether he will proceed in admiralty or resort to his common-law remedy either in a Federal court or in a state court. *Panama R. Co.* v. *Vasquez,* 271 U. S. 557, 46 S. Ct. 596; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 38 S. Ct. 501; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 44 S. Ct. 274; *State ex rel.* v. *Falkenhainer,* 309 Mo. 224, 274 S. W. 758; *Berry* v. *Donovan & Sons,* 120 Me. 457, 116 Atl. 250; *Marking* v. *New St. Louis & Calhoun Packet Co.,* 48 F. Supp. 680 (D. C., Ky.); *Jansson* v. *Swedish American Line,* 185 F. 2d 212 (C. C. A. 1); *Philadelphia & R. R. Co.* v. *Berg,* 274 Fed. 564 (C. C. A. 3); see Chart and Commentary by Willock, pp. 210, 227, 228 of 46 U. S. C. A. (Vol. 541 to End).

Whether diversity of citizenship is essential for the suitor to invoke the jurisdiction of a Federal court is a matter concerning which the Federal courts are not in agreement. The Third Circuit holds in *Philadelphia & R. R. Co.* v. *Berg, supra,* that diversity of citizenship is essential, whereas the First Circuit in *Jansson* v. *Swedish American Line, supra,* holds that diversity of citizenship is not essential to maintenance of the common-law action in a Federal court and that diversity, if present, is only a cumulative basis of jurisdiction. The District Court in the case at bar unquestionably had jurisdiction for diver-

sity of citizenship was present and alleged as a basis of jurisdiction.

So far as we can discover, all of the courts recognize that if the suitor elects to pursue his common-law remedy in either state or Federal court he thereby gains the right of trial by jury. This is the necessary effect of the Seventh Amendment providing that in all suits at common law the right of trial by jury shall be preserved. State constitutions contain equivalent guaranties.

We thus have a common-law action in a Federal court to recover damages *in personam* on account of a maritime tort, wherein trial by jury was demanded and accorded but in which the effect of contributory negligence has been ruled in accordance with common-law principles rather than those of admiralty law. Petitioner contends that his substantive rights are governed in all courts by the principles of admiralty law.

Under the general principles announced by this court in such cases as *Panama R. Co.* v. *Vasquez, supra; Chelentis* v. *Luckenbach, supra,* and *Red Cross Line* v. *Atlantic Fruit Co., supra,* there would seem to be no sound reason for any doubt. If there ever was any genuine occasion for doubt, the philosophy of *Garrett* v. *Moore-McCormack,* 317 U. S. 239, 63 S. Ct. 246, a case under the Jones Act, should have put it at rest. However, the precise question has not been decided by this court.

In the recent case (1950) of *Jansson* v. *Swedish American Line, supra,* the First Circuit states that it has now been established "by an impressive body of precedent that when a common law action is brought, whether in a state or a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied by an admiralty court—that is,

the general maritime law, as developed and declared, in the last analysis, by the Supreme Court of the United States, or as modified from time to time by Act of Congress." And, in *Philadelphia & R. R. Co.* v. *Berg, supra* (Third Circuit), where plaintiff brought an action on the law side of the Federal court to recover damages for personal injuries sustained in a maritime tort, it was said: "Whether the action is tried at common law or in admiralty, the liability of the defendant is measured by the maritime law and not by the common law. * * * the law allows the plaintiff to elect which remedy he will pursue, and he has elected to pursue his common-law remedy for damages in tort, measured by the rules applicable in admiralty cases. The Supreme Court of the United States has not passed upon this specific question, * * *."

The same view was originally taken by the Second Circuit in *Port of New York Stevedoring Corp.* v. *Castagna,* 280 Fed. 618, cert. den. 258 U. S. 631, 42 S. Ct. 463, and cited with approval by this court in *Garrett* v. *Moore-McCormack, supra.* However, the Second Circuit has (in *Johnson* v. *U. S. Shipping Board,* 24 F. 2d 963, and *In re Pennsylvania R. Co.,* 48 F. 2d 559) announced the overruling of its prior decision and taken the position that contributory negligence defeats plaintiff when he is pursuing his common-law remedy, saying (48 F. 2d 559, l. c. 566):

> "* * * as between a common-law court and a court of admiralty the question is treated as one of procedure, though in general the law is otherwise."

This court, in *Garrett* v. *Moore-McCormack, supra,* held that in an action to recover for injuries for a maritime tort brought under the Jones Act in a state court of

Pennsylvania, the Pennsylvania rule, that the burden of proof is on the plaintiff to invalidate a release, is not applicable. This court held that the admiralty principle, that the burden is upon the defendant to sustain a release rather than a plaintiff to overcome it, is the applicable principle. *In its broad consideration of the question this court, we think, announced principles which are necessarily controlling in the case at bar and although the specific case before the court was one based on the Jones Act it is not perceived how the fundamental reasoning applied by this court would be any less applicable in the case at bar.*

In the trial court respondent asked and obtained from the trial judge a more favorable instruction than that to which it was entitled, namely, a charge to the effect that if petitioner was found by the jury to be guilty of contributory negligence, a verdict should be returned in favor of respondent. The jury, however, resolved this issue under the instructions given in favor of petitioner. Petitioner did not, therefore, appeal.

Respondent did appeal, complaining not of the instructions on the merits (more favorable to it than the law warranted) but complaining that, the jury not having found petitioner guilty of contributory negligence, the reviewing court should now proceed to *convict the trial court of error in refusing to direct a verdict in favor of respondent on the ground that petitioner was guilty of contributory negligence and that such contributory negligence barred him from recovery.* The majority of the reviewing court *has done this* and has now not only declared as a matter of law that petitioner was guilty of contributory negligence but declared that such contributory negligence under Missouri law precludes him from recovery.

III.

The majority has substituted its own findings of fact for those of the jury, contrary to the Seventh Amendment. Judge Johnsen, in his able and analytical dissenting opinion (199 F. 2d 941, l. c. 946), has pointed out why no court is warranted under the factual situation existing here in disregarding the conclusion of the jury.

In *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, certiorari was granted because of the important question of petitioner's right to a jury determination of the issue of causation, the Court of Appeals, having by reasoning parallel to that adopted by the majority here, held that there was not sufficient proof to go to the jury. This court held that the conclusion of the jury,

> "whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, where the action was brought under the Jones Act on the law side to recover for personal injury suffered in a maritime tort, certiorari was granted to review refusal to submit the case to the jury. This court, pointing out that the case was close, said:

> "* * * this is no reason for a court to usurp the function of the jury."

What Captain Rupert could see and did see is a question of fact. The inferences to be drawn from the facts are in dispute. Fair-minded men could reach different conclusions.

How do judges of a reviewing court judicially know what can be seen and appreciated from such an undetermined position? Captain Rupert was sitting in the rear end of a small fishing boat, his left hand on the tiller, the outboard motor running, his ears but a few feet from the motor, his eyes about 3 feet above water level (Tr. 17), making, as he described it, "general observations all around as that was his whole purpose to see what could be seen." No witness, except Captain Rupert, has testified as to what can be seen from such position. He knows and he has testified as to what he saw and as to the appearance of the dam and water as they were presented to him on June 12, 1950.

The majority has apparently been estimating the fact situation from a bird's-eye view of the scene. Of course, one on an observation platform or otherwise sufficiently elevated above the surface of the water could see the location of the spillway and that water was overflowing the spillway. What Captain Rupert could see from his position is quite another thing.

Captain Rupert from his position of limited observation saw a dark line of demarcation which he took to be the edge of the pond. Perhaps he was induced in this belief by his lack of knowledge that there are dams with open spillways of the type involved and by his previous experience that spillways are located on one side or the other of the stream. But, whatever factors entered into his observational estimate, it is corroborated by James P. Miller of the Corps of Engineers of the War Department who, upon examining Exhibits 5 and 6 produced by respondent (Tr. 21, 22) *testified that they do not disclose even to him, an expert,* whether or not water is overflowing the spillway and that the picture *"would indicate that the body of water comes to an abrupt end"* (Supp. Tr. 11).

CONCLUSION.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all the proceedings in the case of *The Empire District Electric Company* v. *Oran H. Rupert,* No. 14571, in that court, to the end that the judgment of said Court of Appeals may be reversed by this court, and that your petitioner may have such other and further relief in the premises as to this court may seem just; and your petitioner will ever pray.

ORAN H. RUPERT,
Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 561.

ORAN H. RUPERT, PETITIONER,

VS.

THE EMPIRE DISTRICT ELECTRIC COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

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THE EMPIRE DISTRICT ELECTRIC COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF.

STATEMENT UNDER RULES 27 (4) AND 38 (3).

Petitioner filed this action at law, stated in a petition alleging common law negligence on the part of respondent (Tr. 1-4), which respondent answered, alleging negligence on the part of petitioner (Tr. 5-8), including the specific allegation that the boat was being operated in violation of the provisions of Title 46, U. S. C. A., Section 526.

The case was tried as a common law action and the trial court (Tr. 82-89) instructed the jury that the stream

was navigable (Tr. 84), as to whether the danger was obvious (Tr. 85), as to the negligence of respondent (Tr. 86), and as to the negligence of petitioner (Tr. 87).

Petitioner filed no objection to the charge but did request an additional charge that plaintiff's contributory negligence be limited to plaintiff's knowledge of dams in general (Tr. 90).

The appeal was heard in the United States Court of Appeals, Eighth Circuit, wherein the brief and argument of petitioner was limited to two points: (1) the question of respondent's primary negligence, and (2) the failure of respondent to prove petitioner guilty of contributory negligence as a matter of law.

Petitioner filed a petition for rehearing in which the question of maritime tort or the applicability of admiralty law was not raised or mentioned (Sup. Tr. 19-23).

Thus the petition for this writ is the first time that petitioner has advanced the argument that the accident was a maritime tort or that it was cognizable in a court of admiralty.

The special Act under which the dam in question was constructed by respondent's predecessor was Public Law No. 342, approved February 4, 1911, issued pursuant to 36 Stat. 897 (reprinted 33 U. S. C. A., page 375). This Act specifically provided that the plans and specifications of the dam must be submitted and approved by the Secretary of War and the Chief of Engineers, and that no deviation from such plans or specifications should be made either before or *after completion of the structure,* unless such modification was so submitted and approved. The Act further provided that the persons maintaining such dam should construct and operate in connection therewith any

locks, *booms,* sluices, or other structures deemed necessary in the interests of navigation by the Secretary of War and the Chief of Engineers, or Congress. This Act further provided that the operator of such dam:

> "shall maintain at their own expense such lights and other signals thereon as the Secretary of Commerce and Labor shall prescribe."

Petitioner had suffered battle casualties, resulting in a diagnosis of recurrent concussion (Tr. 12), had been on Lake Taneycomo six days prior to the accident, owned an outboard motor, and had previously fished on lakes in small fishing boats (Tr. 12). He had used the rented boat, with his motor attached, during his stay at the lake, knew the dam existed, and made the trip downstream for the purpose of seeing it (Tr. 13). Petitioner was within 25 or 50 ft. of the spillway (Tr. 14), knew the lake was formed by an impounding dam and that there was a flow of current generally towards the dam (Tr. 15), observed the structures on each side 25 to 35 ft. above the spillway, and saw nothing between the two structures except water (Tr. 16).

Petitioner saw the tree tops below the dam but was interested in a distant, scenic view, so did not observe the river or roadway at the lower level below the dam (Tr. 17), but was making general observations and looking all around, and heard the roar of the water but had the impression that the spillway was at the right hand side, *this being based on past experience* (Tr. 18). This was an impression rather than physically seeing where the water flowed.

Petitioner appreciated some flow near the crest and increased the throttle to pull out of there to make the same rate going upstream as while idling downstream

(Tr. 18), and proceeded some 200 yards upstream, which took approximately five minutes (Tr. 18).

He adjusted his camera and his last memory was when he was 200 yards upstream (Tr. 19), and headed back, intending to retrace his route and take the picture (Tr. 23). Petitioner admits that he knows nothing as to what happened or what he observed on the second trip (Tr. 23), and that he may have steered and sailed over the crest (Tr. 19).

Defendant's Exhibit 5 (Tr. 21), introduced in evidence (Tr. 20), was taken approximately 800 ft. above the dam. Defendant's Exhibit 6 (Tr. 22), introduced in evidence (Tr. 20), was taken approximately 75 ft. above the crest of the dam, in each exhibit the camera being approximately 5 ft. above the water. Stipulation (Tr. 23).

Petitioner admitted that at 25 ft. one naturally could see more downstream and that on his first trip he saw the river below the dam at a distance and that was part of the scene he desired to take (Tr. 24). He also admitted that he could see no barrier and nothing but water between the abutments in Exhibit 5 (Tr. 24).

The testimony of James P. Miller (Tr. 29-30), quoted in petitioner's statement at page 7, was given as an individual (Tr. 25) and referred to the Norfork Dam, which was a mass concrete structure with a roadway on top (Tr. 26), in which are installed twelve taintor gates approximately 40 ft. wide and 28 ft. high (Tr. 27), which opened from the bottom to spill excess water. This type of dam is depicted by Defendant's Exhibit 4 (Tr. 40), introduced in evidence (Tr. 35), which shows such a structure with the water at a low level below the taintor gates.

Defendant's Exhibit 7 (Tr. 45), introduced in evidence (Tr. 44), depicts the Bagnell structure of similar type with

the water above the taintor gates. In this type of dam the water flows under the gates, which created a strong downdraft, or undertow, which would not be visible from the surface, and the signs and booms are maintained to warn the public from coming too close to the structure because of the possibility of their being sucked under or forced against the side of the structure (Tr. 26-27).

Miller also testified that he knew of no regulation of the War Department requiring the maintenance of either booms or warning signs above dams (Tr. 30), that the War Department exercised supervision over the lake formed by respondent's dam (Tr. 31-32), and that the War Department controls the entire Norfork Lake area and posts signs other than at the dam relative to the use of the area (Tr. 31).

He further testified that the Nimrod Dam, being an uncontrolled and open spillway dam, was operated by the Corps of Engineers without booms or buoys (Tr. 30), but only with two signs which were not illuminated at night (Tr. 34).

As to Defendant's Exhibit 6, he testified that he could see a difference in the elevation of the body of water and what appeared to be the river below, and assumed from the picture that the water was going over the spillway, and that the two higher structures on the opposite ends would be indicative of something there (Tr. 41).

Petitioner's witness, W. Bruce James, testified that at the time Exhibit 7 was taken there was a flow under the taintor gates of 49,000 ft. per second and a flow through the power house of 24,000 ft. per second and that nothing in the exhibit would indicate that water was going through the spillway (Tr. 49).

In the type of dam in question the hazard is open, apparent and observable and should be appreciated by any one using reasonable care.

Respondent's expert, G. E. Schmitt, Chief Engineer of the Lower Colorado River Authority, testified (Tr. 69) that he did not know of any open or overflow spillway type dams at which warnings were maintained upstream, or where booms are or have been maintained as a warning to the public. It is in direct contrast with the mass concrete—taintor type dam where the water is spilled some 20 or 30 feet below the surface and where the hazard is concealed, hidden and not apparent.

The Court of Appeals, in its opinion, points out the inconsistency of petitioner's testimony as to what he saw below the dam on his first trip (Opinion 5-6). The court also noted that for thirty years respondent had maintained white lights on the upstream side of the dam, as well as one red light at each end of the spillway, which were illuminated at night (Opinion 6-7). The opinion also states (Opinion 12):

> "We cannot escape the conclusion that the plaintiff was contributorily negligent *and that such negligence was the direct and proximate cause of his injury.*"

ARGUMENT.

I.

The United States Supreme Court, in reviewing decisions of a Circuit Court of Appeals on certiorari, will not determine issues not considered below.

The Record clearly shows that petitioner did not raise the question of admiralty law in either the trial court or

the United States Court of Appeals for the Eighth Circuit. The record is devoid of any reference to a maritime tort or to admiralty law and the requested instructions by petitioner in the trial court as to contributory negligence indicate an acquiescence in the trial of the case as a common law action in a law court. This same position was maintained by petitioner in the United States Court of Appeals.

The rule of the United States Supreme Court is well stated in the case of *Montana Railway Co.* v. *Chas. S. Warren,* 137 U. S. 348, 11 S. Ct. 96, 34 L. Ed. 681, where the court held in a proceeding in error to the Supreme Court of the Territory of Montana that when the judgment of a court was challenged in error the rulings alone were open to consideration and that mere matters of error, to which the attention of the appellate court was not called, were waived.

The opinion states, 34 L. Ed., l. c. 682:

> "The question now arises whether our inquiry is limited to the matters presented to and considered by that court, or should be broadened to all matters that transpired at the trial. Obviously, the former. * * * It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. * * * Our conclusion, therefore, is that our inquiry in this case is only in relation to the matters presented to and reviewed by the Supreme Court of the Territory."

This rule was affirmed in the case of *Magruder* v. *Drury,* 235 U. S. 106, 35 S. Ct. 77, where this court, at l. c. 79, stated:

> "This court, therefore, sits as an appellate court for the purpose of reviewing the decree of the Court of Appeals, and that is the extent of the jurisdiction

> here. * * * Alleged errors not of a fundamental or jurisdictional character, which were not presented to the appellate court for consideration and which were waived, either expressly or by implication, will not be regarded as before this court."

This principle of law has been followed by this court in the following later cases on application for writs of certiorari: *Blair* v. *Oesterlein Machinery Co.*, 275 U. S. 220, 48 S. Ct. 87, and *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 56 S. Ct. 269.

In the recent case of *United States et al.* v. *New York Telephone Co.*, 326 U. S. 638, 66 S. Ct. 393, this court stated, in an appeal from the District Court of the United States for the Southern District of New York, in passing on the question of a permanent injunction granted by the lower court to an order of the Federal Communications Commission, in a footnote at l. c. 399:

> "That point, whatever its merits, was not made until the case reached this court. *Accordingly we do not consider it.*"

It is respondent's contention that petitioner, by acquiescing in the trial of this cause as a common law action in both the trial and appellate courts, and failing to present in either such court his current theory as to the application of admiralty rules, has waived his right so to do, and that such point is not properly for consideration by this court in a petition for certiorari.

There is no jurisdictional point presented, as clearly the trial court and the court of appeals had jurisdiction of the cause, the only issue being as to whether it should be determined under the doctrine of common law or under the rules of admiralty.

II.

Petitioner would not be entitled to recover under the rules of admiralty upon the record presented for review.

In the early case of *The Propeller Genesse Chief et al. v. Henry Fitzhugh et al.*, 12 How. 443, 13 L. Ed. 1058, this court discussed the Act of February 26, 1845 (5 Stat. 726), as to the extension of admiralty jurisdiction to navigable rivers and limited the extension to public waters used for commercial purposes or foreign trade, excluding vessels engaged in domestic commerce and vessels under twenty tons burden, as provided in said Act. The tonnage limitation has been carried forward as to the right to trial by jury in 28 U. S. C. A. 1873, and the Merchant Seamen's Act, Chapter 18 of Title 46, U. S. C. A., in many provisions, excludes the applicability to fishing or whaling vessels or yachts.

Section 713 of this Act provides:

> "Every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be 'the master' thereof."

Whereas the rules of admiralty have been clearly extended by statute and decisions of this court, we find no such extension which would indicate that such rules are applicable to a fourteen-foot fishing boat engaged in a purely local enterprise, even though upon navigable waters.

The fact that Congress saw fit to pass the Motor Boat Act of 1940, Title 46, U. S. C. A. 526, *et seq.*, would seem significant. This Act, Section 526-1, provides:

> "No person shall operate any motor boat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person."

If petitioner is entitled to an adjudication under the rules of admiralty, we submit that the record below fails to show any negligence upon the part of respondent which contributed to the unfortunate accident; whereas, the appellate court found that petitioner was guilty of negligence and that such negligence was the direct and proximate cause of his injury.

This court held in *Stephen O. Nelson et al.* v. *Lucius C. Leland et al.*, 22 How. 48, 63 U. S. 269, a case regarding liability under admiralty law for a collision between two boats plying an inland river, that the navigator of a boat should act with a presumed knowledge of his duty to follow the regulations applicable to internal navigation and be held responsible accordingly.

The court held, l. c. 272 (63 U. S.):

> "Seeing the light ahead, the navigator, in the use of ordinary caution, should have stopped his boat at once, and reversed her wheels, until the locality of the light was clearly ascertained. It is no excuse that he mistook the light for a place of landing. The commander cannot lessen his responsibility by alleging his mistake. He is bound to make no mistake for it is his duty to stop his boat where he doubts, until he ascertains the facts."

This case prescribes the duty of a person navigating upon the inland waters.

In the case of *Corby* v. *Ramsdell*, (Second Circuit, 1931) 48 F. 2d 701, the operator of a yacht, unfamiliar witn the water, ran upon an unauthorized, broken-down pier which was unmarked. The court held that the navigator of a yacht was not held to the same duty as the pilot of a commercial vessel, but, at l. c. 704, stated:

> "* * * but we hold that he was chargeable with such knowledge as the examination of a government chart would have given him, and that, in the light of the information that he might readily have obtained, he was not justified in going outside of the channel."

The duties of the navigator of a motor boat were also reviewed in the case of *Puget Sound Nav. Co.* v. *Nelson,* (Ninth Circuit, 1930) 41 F. 2d 346, wherein it was held that a motor boat not displaying the statutory signals, must, in order to recover, show that its fault could not have contributed to the disaster. The court cited and followed *Belden* v. *Chase,* 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218.

In the recent case of *Seaboard Airline R. Co.* v. *Pan American & Transport Co.,* (Fifth Circuit, 1952) 199 F. 2d 761, libel was brought by the owners of a bridge against the owners of a tanker which ran into the bridge. A cross-libel was filed and the lower court found against the original libelant.

The court of appeals reversed the finding and granted judgment for the original libelant for the amount of damage to the bridge, and the court stated, l. c. 765:

> "The conditions prevailing at the time and place were of long standing, and those navigating the vessel were charged with the knowledge of them and with the correspondent duty of care to prevent the ship from shearing, or if she sheared, to take proper precaution to prevent or minimize damages likely to result therefrom (Cases cited)."

We feel that the court's discussion in this case clearly distinguishes the passive negligence of the bridge owners and the active negligence of the operator of the ship, which are analogous to the case at bar.

There is a well established rule in admiralty that where clear fault has been found on the part of one of the vessels which is sufficient to account for the disaster that it is not enough for such vessel to raise a doubt with regard to the management of the other vessel.

In the case of *The Ludvig Holberg,* 157 U. S. 60, 39 L. Ed. 620, this court cites and quotes from *Alexander* v. *Machan,* 147 U. S. 72, at l. c. 624, of 39 L. Ed., as follows:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

In the case of *The M. J. Rudolph,* 292 Fed. 740, the court, l. c. 743, states:

> "The fault of The Rudolph is so grave *and so fully accounts for the collision* that the court should not be astute to find fault with the navigation of the Roche. We think the case is one in which we should unhesitatingly apply the rule laid down in *The City of New York,* in *The Ludvig Holberg,* and in *The Umbria,* that where the fault of one vessel is gross any doubts regarding the management of the other vessel, *or the contribution of her faults,* if any, to the collision should be resolved in her favor" (Citations omitted and emphasis supplied).

The appellate court reversed a decree below for one-half the damages and awarded full damages tc the libelants.

This doctrine is followed in the case of *The Venilla,* 45 F. 2d 864; *The Priscilla,* 55 F. 2d 32; and *Goodrich Transit*

Company v. *City of Chicago,* (Seventh Circuit, 1925) 4 F. 2d 636, where a steamer collided with a crib maintained by defendant located in the navigable waters of Lake Michigan.

The courts have consistently held that the application of the admiralty rule of apportionment of damages was precluded where the fault of one party was obvious and inexcusable.

The judgment of the Eighth Circuit Court of Appeals specifically finds that the negligence of petitioner was the direct and proximate cause of his injury. This finding is supported by the record, and it is the Federal, as well as the Missouri, rule that where there is no substantial evidence in the record upon which to base a finding in favor of plaintiff upon the question of proximate cause that the court should instruct a verdict for the defendant. *Chicago, B. & Q. Ry.* v. *Gelvin,* 238 Fed. 14; *Johns-Manville* v. *Pocker,* 26 F. 2d 204; *Ft. Smith Gas Co.* v. *Cloud,* 75 F. 2d 413.

Petitioner was no stranger to the situation, since he admittedly had made a trip to within 25 feet of the crest of the dam and returned to a place of absolute safety 200 yards upstream. From that point there is no evidence as to what happened and only the statement of petitioner that he intended to retrace his former course. We submit that a verdict based upon this evidence could not be sustained by the appellate court at law or in admiralty, as any such verdict would be based upon mere speculation, conjecture and surmise.

CONCLUSION.

Wherefore, respondent respectfully requests this court to deny petitioner's application for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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